

No. 53250-2

78739-5

COURT ADMINISTRATOR/CLERK

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

Bowman, Jacob,

) Personal Restraint

) Petition

)  
Petitioner.

A. Status of Petitioner

I, Jacob Bowman, Clallam Bay Corrections Center, 1830 Eagle Crest Way,  
Clallam Bay, WA 98326, apply for relief from confinement. I am now in custody serving  
a sentence upon conviction of a crime.

1. The court in which I was sentenced is Whatcom County Superior Court.
2. I was convicted of the crime(s) of second degree felony murder under RCW  
9A.32.050(1)(b).
3. I was sentenced after plea of guilty on May 18, 1998. The judge who imposed  
sentence was Hon. David Nichols.
4. My lawyer at trial was Richard Kimberly (WSBA #10666).
5. I did appeal from the decision of the trial court. I appealed to Court of Appeals of  
the State of Washington, Division One.

My lawyer on appeal was: the Washington Appellate Project, 1305 Fourth Ave.,  
Ste 802, Seattle, WA 98101, telephone (206) 587-2711.

The decision of the appellate court was not published.

6. Since my conviction I have \_\_ have not ☒ asked a court for some relief from my  
sentence other than I have already written above. (If the answer is that I have asked, the  
court I asked was (name of court or courts in which relief was sought)

.)

Relief was denied on *(date of decision or, if more than one, dates of all decisions)*\_\_\_\_\_

7. (If I have answered in question 6 that I did ask for relief), the name of my lawyer in the proceeding mentioned in my answer to question 6 was *(name and address if known; if none, write "none")*\_\_\_\_\_.

8. If the answers to the above questions do not really tell about the proceedings and the court, judges and attorneys involved in your case, tell about it here: \_\_\_\_\_

9. In addition to filing this personal restraint petition, I also seek an order allowing me to proceed *in forma pauperis* and with the assistance of appointed counsel.

B. Grounds for Relief

I claim that I have one reason for this court to grant me relief from the conviction and sentence described in Part A.

## First Ground

1. I should be given a new trial or released from confinement because I was convicted of the crime of second degree felony murder, with the predicate offense of drive-by shooting. On October 24, 2002, the Washington Supreme Court held in In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), that assault cannot be the predicate for a charge of second degree felony murder. I urge this court to hold that the Andress holding extends to my case, where drive-by shooting was the predicate offense for the crime of second degree felony murder.

The Washington Supreme Court in Andress explicitly held that a charge under RCW 9A.32.050(1)(b), second degree felony murder, cannot be predicated on the underlying charge of assault in the second degree. The Court based its holding on an interpretation of the 1976 felony murder statute that had never been addressed in prior cases. Once the Supreme Court construes a statute, that meaning is deemed to be what the statute has meant since its enactment and there is no question of retroactivity. In re Vandervlugt, 120 Wn.2d 427, 436, 842 P.2d 950 (1992). Thus, since 1976, a felony murder conviction cannot be based on assault in the second degree as a predicate felony. Thus, at the time I was convicted of second degree felony murder in 1998, there was no such thing as felony murder based upon second degree assault.

In Andress the Court based its holding on its conclusion that “the language of the [second degree felony murder] statute . . . does not encompass assault as a predicate felony.” 147 Wn.2d at 605. At the time the Andress decision was made, the second degree felony murder statute provided that a person is guilty of second degree felony murder if, where there is no intent to cause the death of the victim, the defendant “commits or attempts to commit any felony other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants.” RCW 9A.32.050. The Andress Court stated “the ‘in furtherance of’

language must be construed to mean that the death ‘was sufficiently close in time and place to the [predicate felony] to be part of the res gestae of that felony.’” 147 Wn.2d at 609.(quoting State v. Leech, 114 Wn.2d 700, 709, 790 P.2d 160 (1990)). Thus, “[i]t is nonsensical to speak of a criminal act -- an assault -- that results in death as being part of the res gestae of that same criminal act since the conduct constituting the assault and the homicide are the same.” Id. at 610.

Moreover, the Andress Court concluded that the Legislature did not intend assault to serve as the predicate felony for second degree felony murder, because such a result was unduly harsh. Id. at 616. This is because second degree felony murder would not require proof of an intent to kill if based on one of the statutory definitions of assault that do not require proof of intent. Id. at 614-16.

‘A felony-murder that punishes all homicides committed in the perpetration of a felony whether the death is intentional, unintentional or accidental, without the necessity of proving the relation of the perpetrator’s state of mind to the homicide, violates the most fundamental principle of the criminal law -- criminal liability for causing a particular result is not justified in the absence of some culpable mental in respect to that result.’

Id. at 615 (quoting State v. Tamalini, 134 Wn.2d 725, 746, 953 P.2d 450 (1998) (Sanders, J., dissenting)) (other citation omitted).

RCW 9A.36.045, the drive-by shooting statute, provides:

A person is guilty of drive-by shooting when he or she recklessly discharges a firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

The statute was enacted in 1989, based on the Legislature’s concern about the increased likelihood of “drive-by shootings” and its intent to categorize such reckless and criminal activity into a separate crime and to provide greater punishment than previously allowed under the reckless endangerment statute. See note following RCW 9A.36.050.

The same principles set forth in Andress apply here, where drive-by shooting is the predicate felony for second degree felony murder. First, as the Court stated in Andress, it is nonsensical to speak of a criminal act -- a drive-by shooting -- that results in death as being part of the res gestae of that same criminal act since the conduct constituting the drive-by shooting and the homicide are the same. Moreover, if under the current statutory scheme, drive-by shooting can serve as the predicate felony for second degree felony murder, then a person who only recklessly discharges a firearm, which results in death, can be convicted of second degree murder, although RCW 9A.32.060 provides that a person who recklessly causes the death of another is guilty only of first degree manslaughter. See Andress, 147 Wn.2d at 615. As in Andress, “[t]hat makes little sense” and is unduly harsh. Id. at 615-16.

My conviction was based on a non-existent crime: felony murder in the second degree based on drive-by shooting. If a person is convicted of a non-existent crime, due process of law, guaranteed by U.S. Const. amend 14 and Wash. Const. art. 1, § 3 is violated. The federal due process clause prohibits conviction under a state statute that, when properly interpreted, does not apply to the defendant’s conduct. Fiore v. White, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001). My conviction therefore violates the due process clauses of the federal and state constitutions and the conviction must be vacated.

Moreover, my personal restraint petition is not time-barred. The one-year time limit on PRPs applies only “if the judgment and sentence is valid on its face.” RCW 10.73.090(1). The judgment and sentence in my case reveals conviction of a non-existent crime, second degree felony murder with an underlying predicate crime of drive-by shooting. Further, RCW 10.73.100(2) provides an independent ground for filing outside the one-year time limit. It states that the one-year time limit does not apply where “[t]he statute . . . was unconstitutional on its face or as applied to the [petitioner’s] conduct.” The felony murder statute was unconstitutional as applied to my conduct because, as

discussed above, it violates due process to convict a person of a non-existent crime. Finally, RCW 10.73.100(6) states that the one-year time limit does not apply where “[t]here has been a significant change in the law, whether substantive or procedural, which is material to the conviction.” As discussed above, the Andress decision constitutes a significant change in courts’ interpretation of the law.

Finally, the mandatory joinder rules under CrR 4.3.1 preclude refiling of any other additional charges should my conviction be reversed. State v. Russell, 101 Wn.2d 349, 353, 678 P.2d 332 (1984); State v. Martin, 55 Wn. App. 275, 278, 776 P.2d 1383 (1989).

C. Statement of Finances

If you cannot afford to pay the filing fee or cannot afford to pay an attorney to help you, fill this out. If you have enough money for these things, do not fill out this part of the form.

1. I do ☒ do not ☐ ask the court to file this without making me pay the filing fee because I am so poor I cannot pay the fee.
2. I have \$\_\_\_\_\_ in my prison or institution account.
3. I do ☒ do not ☐ ask the court to appoint a lawyer for me because I am so poor I cannot afford to pay a lawyer.
4. I am ☐ am not ☒ employed. My salary or wages amount to \$\_\_\_\_\_ a month. My employer is *(name and address)*\_\_\_\_\_
5. During the past 12 months I did ☐ did not ☒ get any money from a business, profession or other form of self-employment. (If I did, it was *(kind of self-employment)*\_\_\_\_\_ and the total income I got was \$\_\_\_\_\_.)
6. During the past 12 months, I  
did ☐ did not ☒  
— ☒ get any rent payments. If so, the total amount I got was \$\_\_\_\_\_.  
— ☒ get any interest. If so, the total amount I got was \$\_\_\_\_\_.  
— ☒ get any dividends. If so, the total amount I got was \$\_\_\_\_\_.  
— ☒ get any other money. If so, the amount of money I got was \$\_\_\_\_\_.- 7. — ☒ have any cash except as said in answer 2. If so, the total amount of cash I have is \$\_\_\_\_\_.

- ☒ have any savings accounts or checking accounts. If so, the total amount of cash I have is \$\_\_\_\_\_.
- ☒ own stocks, bonds, or notes. If so, their total value is \$\_\_\_\_\_.

8. List all real estate and other property or things of value which belong to you or in which you have an interest. Tell what each item of property is worth and how much you owe on it. Do not list household furniture and furnishings and clothing which you or your family need.

| Items | Value |
|-------|-------|
| <hr/> |       |

9. I am ☐ am not ☒ married. If I am married, my wife or husband's name and address is: \_\_\_\_\_

10. All of the persons who need me to support them are listed here.

| Name and Address | Relationship | Age |
|------------------|--------------|-----|
| <hr/>            |              |     |
| <hr/>            |              |     |
| <hr/>            |              |     |

11. All the bills I owe are listed here.

| Name of creditor<br>you owe money to | Address | Amount |
|--------------------------------------|---------|--------|
|--------------------------------------|---------|--------|

|       |       |       |
|-------|-------|-------|
| _____ | _____ | _____ |
| _____ | _____ | _____ |
| _____ | _____ | _____ |

D. Request for Relief

I want this court to:

- ☒ vacate my conviction and give me a new trial.
- ☐ vacate my conviction and dismiss the criminal charges against me without a new trial.

☐ other: \_\_\_\_\_

E. Oath of Petitioner

THE STATE OF WASHINGTON    )  
  ) ss.  
COUNTY OF CLALLAM )

After being first duly sworn, on oath, I depose and say: That I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

\_\_\_\_\_  
[sign here]

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

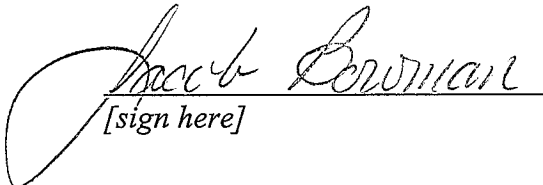
\_\_\_\_\_  
Notary Public in and for the State of Washington,  
residing at \_\_\_\_\_.

If a notary is not available, explain why none is available and indicate who can be contacted to help you find a notary: MY COUNCILER  
NORMAN BRIGHT

Then sign below:

I declare that I have examined this petition and to the best of my knowledge and belief it is true and correct.

Dated this 20<sup>th</sup> day of OCTOBER, 2003.

  
[sign here]

## **APPENDIX**

RECEIVED

MAY 28 1998

LAW OFFICE OF  
RICHARD C. KIMBERLY

R. Kimberly  
FILED IN OPEN COURT  
5-18 19 98  
WHATCOM COUNTY CLERK

By \_\_\_\_\_  
Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON, )

Plaintiff, )

vs. )

JACOB DANIEL BOWMAN )

Defendant. )

No. 97-1-00572-1

JUDGMENT AND SENTENCE  
(FELONY)

I. HEARING

1.1 A sentencing hearing in this case was held:  
May 18, 1998.

1.2 Present were:

Defendant: JACOB DANIEL BOWMAN

Defendant's Lawyer: RICHARD C. KIMBERLY

Prosecuting Attorney: DAVID S. MCEACHRAN

Judge: DAVID A. NICHOLS

1.3 The State has moved for dismissal of Count(s) n/a.

1.4 Defendant was asked if there was any legal cause why  
judgment should not be pronounced, and none was shown.

II. FINDINGS

Based on the testimony heard, statements by defendant and/or  
victims, argument of counsel, the presentence report and case  
record to date, the Court finds:

2.1 CURRENT OFFENSE(S): The defendant was found GUILTY on  
April 30, 1998, by PLEA of: MURDER IN THE SECOND DEGREE:

Count No. I

Crime: MURDER IN THE SECOND DEGREE

RCW: 9A.32.050(1)(b) and 9.94A.310(3)(a)

Crime Code: Class "A" Felony

Date of Crime: July 3, 1997

Incident No. 97B-22161

JUDGMENT AND SENTENCE (FELONY)  
CONFINEMENT OVER ONE YEAR - 1

ORIGINAL

(XX) With a special verdict/finding for use of deadly weapon on Count(s): I.

( ) Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400(1)):

( ) Additional current offenses are attached in Appendix A.

2.2 CRIMINAL HISTORY: Criminal history used in calculating the offender score is (RCW 9.94A.360): NO FELONY HISTORY OF WHICH WE ARE AWARE.

2.3 SENTENCING DATA:

|              | Offender<br>Score      | Seriousness<br>Level | Range        | Maximum<br>Term |
|--------------|------------------------|----------------------|--------------|-----------------|
| COUNT NO. I: | 0                      | XIII                 | 123-220 mos. | LIFE            |
|              | (plus firearms clause) |                      | 60 mos.      | IMPRISONMENT    |
|              |                        | TOTAL:               | 183-280 mos. |                 |

2.4 EXCEPTIONAL SENTENCE:

( ) Substantial and compelling reasons exist which justify a sentence (above) (below) the standard range for Count(s) \_\_\_\_\_. Finding of Fact and Conclusions of Law are attached in Appendix D.

2.5 CATEGORY OF OFFENDER: The defendant is:

(a) (XX) An offender who shall be sentenced to confinement over one year.

(b) ( ) An offender who shall be sentenced to confinement one year or less.

(c) ( ) A first time offender who shall be sentenced under the waiver of the presumptive sentence range (RCW 9.94A.030(12), .120(5)).

### III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the crime(s) of: MURDER IN THE SECOND DEGREE.

JUDGMENT AND SENTENCE (FELONY)  
CONFINEMENT OVER ONE YEAR - 2

IV. ORDER

IT IS ORDERED that defendant serve the determinate sentence and abide by the conditions set forth below.

4.1 Defendant shall pay to the Clerk of this Court:

- (a) \$110.00 court costs;
- (b) \$500.00 victim fund assessment;
- (c) \$ TBD - restitution  
\_\_\_\_\_ Joint & several with co-defendant;  
\_\_\_\_\_ On all counts charged;  
\_\_\_\_\_ Other:

( ) Schedule of Restitution is attached as Appendix E.

(d) \$ n/a recoupment for court-appointed attorney's fees;

(e) \$ \_\_\_\_\_ fine;

(f) \$ \_\_\_\_\_ drug enforcement fund;

(g) OTHER COSTS FOR:

( ) \$100.00 = CRIME LABORATORY ANALYSIS

(h) \$ 610.00 + RESTITUTION = TOTAL MONETARY OBLIGATIONS

(i) Payments shall be made in the following manner:

(XX) That the defendant shall set up a payment schedule with his/her community corrections officer. That the defendant shall report IMMEDIATELY to his/her Community Corrections Officer to set up a schedule for the payment of his/her court-ordered legal financial obligations and the Community Corrections Officer shall monitor these payments.

( ) That defendant shall pay the amount of \$ \_\_\_\_\_ per month toward his/her legal financial obligations. That the defendant shall report IMMEDIATELY to his/her Community Corrections Officer to set up a schedule for the

payment of his/her court-ordered legal financial obligations and the Community Corrections Officer shall monitor these payments.

(j) This Court shall retain jurisdiction over the defendant for a period of TEN (10) years to assure payment of the above monetary obligations.

4.2 The Court DISMISSES Count(s) n/a.

4.3 CONFINEMENT OVER ONE YEAR: Defendant is sentenced to a term of total confinement in the custody of the DEPARTMENT OF CORRECTIONS as follows commencing IMMEDIATELY:

220 MONTHS for Count No. I.  
60 MONTHS for Firearms Clause.

(XX) Credit is given for TIME SERVED OF TED DAYS as of July 3, 1997, and credit for any additional time served beyond that date until defendant is transported to the Department of Corrections.

(XX) That the defendant shall cooperate fully with the Bellingham Police Department and the Whatcom County Prosecutor's Office in the investigation of all of the events leading to the shooting death of Raymond Hunter, the events immediately after this shooting until defendant's arrest, and the involvement of any other persons in the planning, execution, and covering up of this act;

(XX) That the defendant shall make a full and truthful statement to Detectives of the Bellingham Police Department and to the Whatcom County Prosecutor's Office concerning all of the events leading to the shooting death of Raymond Hunter, the events immediately after this shooting until defendant's arrest, and the involvement of any other persons in the planning, execution, and covering up of this act; That this statement shall be made under oath;

(XX) That the defendant shall submit to a polygraph test or tests given by officers of the Bellingham Police Department to verify his truthfulness and the completeness of the statement or statements that he makes concerning all of the events leading to the shooting death of Raymond Hunter, the events immediately after this shooting until defendant's arrest, and the

involvement of any other persons in the planning, execution, and covering up of this act;

(XX) That the defendant shall, if called as a witness, testify truthfully and fully concerning all of the events leading to the shooting death of Raymond Hunter, the events immediately after this shooting until defendant's arrest, and the involvement of any other persons in the planning, execution, and covering up of this act.

(XX) That the defendant understands and agrees that if the Prosecuting Attorney believes there has been a failure of any of the above-mentioned conditions, the determination of such failure shall be made by the sentencing judge. If the judge determines that any of the conditions have not been met by the defendant, the defendant agrees that the sentencing court shall review the sentence imposed and may re-sentence the defendant within the standard range.

(XX) CUSTODIAL RECOMMENDATION FOR COMMUNITY PLACEMENT FOR TWO (2) YEARS conditioned upon full compliance with the following terms, all of which are imposed pursuant to RCW 9.94A.120(8)(b):

(XX) Defendant shall not possess or own weapons of any kind at any time.

( ) Defendant shall submit to random urine analysis as requested by her supervising community corrections officer at the defendant's own expense.

( ) Defendant shall undergo evaluation for poly drug abuse with strict and full compliance with all treatment recommendations.

( ) Defendant shall not consume alcohol of any kind at any time.

( ) Defendant shall undergo counseling as approved by his/her community corrections officer.

(XX) NO CONTACT PROVISION: Defendant shall not approach or communicate with, directly or indirectly, or through any third person or by any means, with:

ANY MEMBERS OF THE HUNTER FAMILY

The NO CONTACT ORDER previously entered in this cause number is hereby:

(XX) Extended for the statutory maximum sentence, to wit:

- (XX) Permanent: Class A Felony
- ( ) Ten Years: Class B Felony
- ( ) Five Years: Class C Felony
- ( ) One Year: Gross Misdemeanor

(XX) HIV TESTING: The Health Department or designee shall test the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing.

(XX) DNA TESTING: That the defendant shall submit a blood sample of FIVE (5) m.l. to be acquired under medically safe conditions under the supervision of a Whatcom County Corrections Officer. This sample shall be safely transported to the Washington State Crime Laboratory in Seattle, DNA Section, pursuant to RCW 43.43.754.

Violations of the conditions or requirements of this sentence are punishable by up to SIXTY (60) days of confinement for each violation (RCW 9.94A.200(2)).

The following Appendices are attached to this Judgment and Sentence and are incorporated by reference:

- ( ) Appendix A Additional Current Offenses
- ( ) Appendix B Additional Criminal History
- ( ) Appendix C Current Offense(s) Sentencing Information
- ( ) Appendix D Findings of Fact and Conclusions of Law for an Exceptional Sentence
- ( ) Appendix E Schedule of Restitution
- ( ) Appendix F Additional Conditions

SIGNED IN THE PRESENCE OF THE DEFENDANT.


Date:


May 18, 1998

  
JUDGE DAVID A. NICHOLS

Presented by:

Approved as to form:

  
DAVID S. MCEACHRAN,  
Prosecuting Attorney  
WSBA #2496

  
RICHARD C. KIMBERLY  
Attorney for Defendant  
WSBA#10666

\*\*\* Defendant's Name: JACOB DANIEL BOWMAN  
Date of Birth: 11/4/80; Sex: Male; Race: White

By \_\_\_\_\_  
Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON, )  
 )  
Plaintiff, ) No. 97-1-00572-1  
 )  
vs. )  
 )  
JACOB DANIEL BOWMAN, ) WARRANT OF COMMITMENT  
 )  
Defendant. )  
\_\_\_\_\_ )

THE STATE OF WASHINGTON

TO: THE SHERIFF OF WHATCOM COUNTY

The defendant, JACOB DANIEL BOWMAN, has been convicted in the Superior Court of the State of Washington of the crime or crimes of MURDER IN THE SECOND DEGREE, and the Court has ordered that the defendant be punished by serving the determined sentence of 220 months on Count No. J, plus SIXTY (60) MONTHS for the firearm clause which is not subject to good time credit, for a total of 280 months.

Defendant shall receive credit for time served of \_\_\_\_\_ as of July 3, 1997, and credit for any additional time served beyond that date until defendant is transported to the Department of Corrections.

YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

By Direction of the HONORABLE

DATED: 5-18-98

DAVID A. NICHOLS  
JUDGE

N.F. JACKSON, JR., Clerk

By: S. Zimmerman  
Deputy Clerk

CAUSE NUMBER: 97-1-00572-1

Thumb prints of: Jacob Daniel Bowman

Jacob Bowman  
(Defendant's Signature)

Attested by:

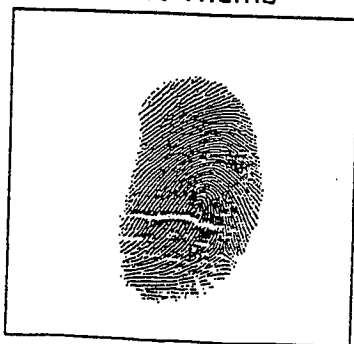
(Seal)

S. Zimmerman  
(Deputy County Clerk)

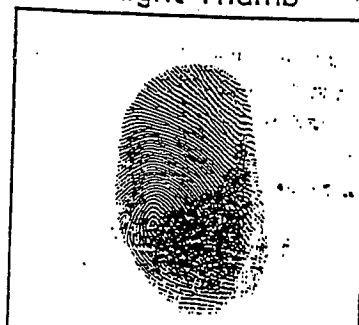
WA0370000

5-18-98 (date)

Left Thumb



Right Thumb



**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

---

JACOB BOWMAN,

PETITIONER.

)  
)  
)  
)  
)

PERSONAL RESTRAINT PETITION

---

**DECLARATION OF SERVICE**

I, MARIA ARRANZA-RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

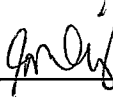
THAT ON THE 22<sup>ND</sup> DAY OF OCTOBER, 2003, A COPY OF THE

**PERSONAL RESTRAINT PETITION**

WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WHATCOM COUNTY PROSECUTOR'S OFFICE  
311 GRAND AVE. 2<sup>ND</sup> FLOOR  
BELLINGHAM, WA 98225

**SIGNED** IN SEATTLE WASHINGTON, THIS 22<sup>ND</sup> DAY OF OCTOBER, 2003.

x  \_\_\_\_\_